1. - Termination Payments Schedule

# Definitions

1. Unless otherwise expressly defined below, expressions used in this Schedule have the meanings given to them in clause 1. In this Schedule:
2. **Compensation Date** means:
	1. for a tender conducted under section 3.3:
		1. where section 3.3(k)(ii) applies, the date on which the State notifies Project Co under section 3.3(k)(ii); or
		2. otherwise the date on which the New Contract is entered into or is anticipated to be entered into; and
	2. for an Independent Expert valuation under section 4:
		1. where it is deemed under section 3.3(g) that there is no Liquid Market, 60 Business Days after the date on which the State notifies Project Co that it has received fewer than two Compliant Tenders under section 3.3(g);
		2. where section 3.3(j) applies, the later of the date on which the State notifies Project Co in accordance with section 3.3(j) and the date which is 60 Business Days after the Expiry Date; or
		3. otherwise the date which is 60 Business Days after the Expiry Date.
3. **Compliant Tender** means any tender submitted that meets the qualification criteria notified under section 3.3(b).
4. **Compliant Tenderer** means the party who submits a Compliant Tender.

**Default Termination Payment** means the Termination Payment calculated under section 3 or section 4.

**Force Majeure Termination Payment** means the Termination Payment calculated under section 6.

**Fair Market Value** means the amount at which an asset, equity or liability could be exchanged in an arm's length transaction between informed and willing parties, other than in a forced or liquidation sale.

**Highest Compliant Tender Price** means the highest tender price offered by a Compliant Tender.

**Independent Expert** means an independent expert appointed under section 2.

**Liquid Market** means where there are at least two contractors (in addition to any party controlled by the Financiers) in the prevailing market prepared to competitively tender for the undertaking of, or acquisition of, projects which are the same or of a similar type to the Project on the same or substantially similar terms and conditions to those of this Deed and each of whom has agreed with the State to submit a Compliant Tender (even if a Compliant Tender is subsequently not received), such that the result of that tender process would provide a reasonably likely indicator as to Fair Market Value.

**New Contract** means a contract that replaces this Deed, but without imposing on the new contracting party any Liability for any breach of this Deed by Project Co prior to the date of that contract, and that assumes that:

* 1. if the New Contract is entered into prior to the Date of Commercial Acceptance, the Works are to be designed, built, commissioned and tested to achieve Commercial Acceptance in accordance with this Deed;
	2. the Services are to be carried out in accordance with, and to the standards set out in, the PSDR and otherwise in accordance with this Deed;
	3. the term of the New Contract will be the period from the Compensation Date to the Final Expiry Date;
	4. the provisions with respect to payment of the State Contributions, Floating Rate Component and Service Payments continue to apply as set out in this Deed, noting that the Operating Phase may be shorter than is contemplated in the Financial Model as a result of delay or forecast delay to the achievement of Commercial Acceptance; and
	5. all other provisions of this Deed continue to apply.
1. **Post Termination Quarterly Amount** means for the whole or any part of a Quarter or Quarters for the period from the Expiry Date to the Compensation Date, an amount equal to the Service Payment, assuming no Abatement, plus or minus the Floating Rate Component, which would have been payable in respect of that Quarter or those Quarters under this Deed had this Deed not been terminated less an amount equal to the aggregate of (without double counting):
	1. the greater of all cost components related to the carrying out of the Services and the reasonable costs to the State of alternative provision of the Services in accordance with, and to the standards set out in, the PSDR and otherwise in accordance with this Deed (whether or not any Services are carried out);
	2. all cost components related to the provision of Insurance; and
	3. Rectification Costs incurred by the State.
2. For the avoidance of doubt, the Post Termination Quarterly Amount can be an amount that is less than zero.
3. **Rectification Costs** means an amount equal to the reasonable and proper costs incurred or reasonably anticipated to be incurred by the State in curing or otherwise addressing any default by Project Co and procuring performance of Project Co's obligations in accordance with the Project Documents.
4. **Tender Costs** means the reasonable and proper internal and external costs incurred by or on behalf of the State in carrying out the Tender Process (if any) and calculating the relevant Termination Payment (including engaging an Independent Expert).
5. **Tender Process** means the process by which the State requests tenders from persons interested in entering into a New Contract, evaluates the responses from those interested parties and negotiates to enter into a New Contract with a Compliant Tenderer.
6. **Tender Process Monitor** has the meaning given to that term in section 3.3(e).
7. **Termination for Convenience Payment** means the Termination Payment calculated under section 5.

# Independent Expert

### (**Calculation of relevant Termination Payment**): If this Deed is terminated and an Independent Expert is required to administer this Schedule, the parties will appoint an Independent Expert to act as an expert calculator of the relevant Termination Payment within 7 Business Days of:

#### in the case of section 4, the date on which that section commences to apply; and

#### in the case of sections 5 and 6, the Expiry Date,

* 1. and the following provisions of clause 49 will apply:

#### clause 49.1(b) to clause 49.1(j), as if:

##### the reference in paragraph (b) to "*the date on which a Dispute is referred to expert determination under clause 49.1(a)*" were a reference to the time referred to in paragraphs (i) and (ii) of this section 2(a), and the reference to "*determine the Dispute*" were a reference to "*calculate a Termination Payment*";

##### the references in paragraph (c) to "*the 5 Business Day period referred to in clause 49.1(b)*" and to "*the Dispute is referred to expert determination under clause 49.1(a)*" were references to the time referred to in paragraphs (i) and (ii) of this section 2(a), and the reference to "*determine the Dispute*" were a reference to "*calculate a Termination Payment*";

##### the references in paragraph (d) to "*determine a Dispute*" and "*determine the Dispute*" were references to "*calculate a Termination Payment*" and the reference to "*the party that gave the notice under clause 48.3(a)*" were a reference to "*the State*";

##### paragraph (e) is deleted and replaced with the following "*Both parties will procure the President of the Australian Centre for International Commercial Arbitration to nominate a person to act as the expert to calculate a Termination Payment, having regard to, but not being bound by, those persons proposed by the parties under paragraph (b) or paragraph (c) within 7 Business Days after the exchange of lists under paragraph (c).*";

##### the reference in paragraph (f) to "*determine a Dispute*" were a reference to "*calculate a Termination Payment*" and the reference to "*matters in Dispute*" were a reference to "*role of the Independent Expert as an expert calculator of the relevant Termination Payment*";

##### the reference in paragraph (j) to "*in respect of the Dispute*" were a reference to "*in respect of the Termination Payment*", and "*the terms of the Expert Determination Agreement*" were a reference to "*terms consistent with section 2 of the Termination Payments Schedule*";

#### clause 49.2 as if the reference to "*the terms of the Expert Determination Agreement*" were a reference to "*the agreement entered into in accordance with clause 49.1(j)*";

#### clause 49.4 as if the reference to "*any Dispute referred to expert determination under this clause 49*" were a reference to "*any calculation of a Termination Payment*"; and

#### clause 49.5(a)(ii) as if the reference to "*any person who is party to the Dispute*" were a reference to "*the parties*".

### (**Independent Expert to consider**): In calculating a Termination Payment, the Independent Expert may have regard to submissions and information provided by the parties, but must have regard to the matters set out in this Schedule and calculate the Termination Payment as an expert calculator.

### (**Request for further information**): If the Independent Expert decides that further information is required, the Independent Expert may call for further submissions, documents or information from either or both parties and the Independent Expert must provide any information received from one party to the other party.

### (**Conduct of conferences by Independent Expert**): The Independent Expert may call and conduct one or more conferences between the parties as the Independent Expert sees fit, but must give the parties reasonable notice of the matters to be addressed at any such conference.

### (**Legal representation of parties at conference**): The parties may be legally represented at any conference under this section 2.

### (**Conferences to be held in private**): All conferences under this section 2 must be held in private.

### (**Independent Expert may visit**): The Independent Expert may, if he or she considers it necessary, visit the Site, the Works, or the Project Assets (as the case may be), and the parties must facilitate the Independent Expert's access to any of those areas.

### (**Timing of determination by the Independent Expert**): The Independent Expert must make his or her determination in relation to the calculation of the Termination Payment:

#### within 20 Business Days of the last of the steps set out in paragraphs (c) to (g); or

#### within 30 Business Days of the date of his or her appointment,

* 1. whichever is the earliest. If the Independent Expert fails to make a determination within this time, either party may refer the matter to dispute resolution in accordance with clauses 48 to 50.

### (**Independent Expert to act as expert**): The Independent Expert will act as an expert and not an arbitrator and may make a decision from his or her own knowledge and expertise.

### (**Cost of Independent Expert to be borne by State**): The cost of the Independent Expert will be borne by the State, but without limiting the State's right to recover those costs as Tender Costs in calculating any Termination Payment.

# Termination for Default Termination Event

## The State's election

### (**State's right to elect**): If the State terminates this Deed due to the occurrence of a Default Termination Event (whether any other basis for termination then applies), the State may, subject to section 3.1(c), elect (in its sole and absolute discretion) to either:

#### conduct a tender for the New Contract in accordance with section 3.3; or

#### require the Independent Expert to undertake an expert determination in accordance with section 4.

### (**State to notify Project Co**): The State will notify Project Co of its election on or before the day falling 20 Business Days after the Expiry Date and if the State fails to notify Project Co of its election by that date, then:

#### if section 3.1(c) does not apply, section 3.1(a)(i) will apply; or

#### if section 3.1(c) applies, section 3.1(a)(ii) will apply.

### (**Circumstances State not entitled to conduct a tender**): The State is not entitled to elect to conduct a tender for the New Contract:

#### where Project Co or the Financiers have demonstrated to the reasonable satisfaction of the State that:

##### the Financiers have used best efforts to procure the transfer of Project Co’s rights and liabilities under this Deed in accordance with the Finance Direct Deed but have not done so; and

##### the reason for the failure to effect a transfer of Project Co’s rights and liabilities under this Deed is that there is no Liquid Market; or

#### where either the State agrees, or it is determined in accordance with clauses 48 to 50, that no Liquid Market exists.

### (**Disputes**): Any Dispute in relation to whether a Liquid Market exists may be referred by either party for resolution in accordance with clauses 48 to 50.

### (**State to pay Post Termination Quarterly Amount**): With respect to all or any part of a Quarter falling within the period from the Expiry Date to the Compensation Date (each inclusive), the State will pay to Project Co the Post Termination Quarterly Amount at the same time that the State would have been required to pay to Project Co the Service Payment or that any Floating Rate Component would have been payable (as applicable) in respect of that Quarter had this Deed not been terminated.

### (**Set off of Post Termination Quarterly Amount**): If any Post Termination Quarterly Amount is less than zero then it will be carried forward and will be set off against any future positive Post Termination Quarterly Amount or other elements of the Default Termination Payment.

## Payment on tender

### (**State elects to conduct a tender**): If the State elects to conduct a tender for the New Contract in accordance with section 3.1(a)(i), sections 3.2 and 3.3 will apply.

### (**Object of Tender Process**): The objective of the Tender Process is to establish a Highest Compliant Tender Price.

### (**Calculation of Default Termination Payment**): The Default Termination Payment will be calculated as follows:

* 1. **TP = A - C - D - E - F - G - H + J - M**
	2. where:
	3. **TP** = the Default Termination Payment;
	4. **A** = the Highest Compliant Tender Price. In determining item A, the Tender Process must:

##### assume:

###### a Compensation Date determined under paragraph (a)(ii) of that definition (which will be subject to adjustment to reflect the actual date on which the Compensation Date occurs);

###### that the Project Activities are carried out in accordance with, and to the standards set out in, the PSDR and otherwise in accordance with this Deed;

###### that the provisions with respect to payment of the State Contributions, Floating Rate Component and Service Payments continue to apply as provided for in this Deed;

###### that any breach of this Deed and any deductions for Abatements occurring prior to the Compensation Date will be disregarded for the purposes of the New Contract; and

###### that the Project Documents will be amended as required to reasonably allow for an incoming provider to carry out the Project Activities in accordance with, and to the standards set out in, the PSDR and otherwise in accordance with this Deed; and

##### take into account:

###### the costs (if any), and their timing, which are required to be incurred to complete the Works in accordance with this Deed and to achieve Commercial Acceptance;

###### the reinstatement or repair costs (if any) and their timing, including a reasonable contingency against Project risks, which are required to be incurred with respect to the Project Assets and the Site, to enable carrying out of the Project Activities until the Final Expiry Date, in accordance with and to the standards set out in the PSDR and otherwise in accordance with this Deed; and

###### any costs, and their timing, required to be incurred to enable the entity (who is to become the new "Project Co") to carry out the Project Activities in accordance with, and to the standards set out in, the PSDR and otherwise in accordance with this Deed and otherwise to perform Project Co's obligations under the Project Documents,

* + - 1. but excluding any costs in relation to which the State will retain the benefit of any retention amount under clause 27.7(l);
	1. **C** = the Tender Costs;
	2. **D** = any Liability of Project Co to the State under the State Project Documents, including all amounts in respect of which the State is entitled to exercise a right of set-off under this Deed (but subject to clauses 43.11(c) and (d) (other than clause 43.11(d)(vi)(E)(3)));
	3. **E** = any additional costs reasonably incurred by the State as a direct result of the Default Termination Event (but subject to clauses 43.11(c) and (d) (other than clause 43.11(d)(vi)(E)(3)));
	4. **F** = to the extent the aggregate of all Post Termination Quarterly Amounts equates to a negative number, the absolute value of the aggregate of all such amounts calculated under this Deed. For the avoidance of doubt the Default Termination Payment is reduced where the aggregate of all Post Termination Quarterly Amounts equates to a negative number;
	5. **G** = any gains which have accrued, or will accrue, to Project Co as a result of the termination of this Deed or termination of any other Project Documents;
	6. **H** = the aggregate of:

#### Insurance proceeds:

##### that would have been received before the Expiry Date but for an Insurance Failure Event and which if so received would have been, or would have been required to be, applied towards any other component of the Default Termination Payment calculated under this section 3; and

##### received or receivable by Project Co at any time during the period between the Expiry Date and the Compensation Date, except for Insurance proceeds:

###### that are required under the Project Documents to be (and are) applied to repairing or reinstating the Works or the Project Assets; or

###### representing Insurance indemnification of Project Co against liabilities to third parties;

#### any other amounts owing to Project Co; and

#### any credit balances standing in accounts held by or for the benefit of Project Co on the Expiry Date (other than those amounts which Project Co holds on trust for a subcontractor in those accounts in accordance with the Finance Documents),

* + 1. in each case only to the extent it has not otherwise been taken into account in the determination of the Default Termination Payment under this section 3;
	1. **J =** any amounts owing by the State to Project Co under the State Project Documents as at the Expiry Date (including amounts of any State Contribution, Floating Rate Component or Service Payments which have accrued but not been paid as at the Expiry Date); and
	2. **M =** any third party amounts paid to Project Co at any time during the period between the Expiry Date and the Compensation Date.
	3. In calculating items A to M, there will be no double counting of amounts. Without limitation, the value of any unpaid State Contribution may be taken into account in item A paragraph (A)(3) as an amount payable under the New Contract, or in item J as an amount payable to Project Co, but not both.

## Tender Process

1. If the State elects to conduct a Tender Process for the New Contract, the following provisions will apply.

### (**State to use reasonable endeavours**): The State will (subject to any legal requirements preventing it from doing so) use its reasonable endeavours to complete the Tender Process as soon as practicable.

### (**State to notify Project Co of qualification criteria and other requirements of Tender Process**): The State will notify Project Co of the qualification criteria, the other requirements and the terms of the Tender Process, including the timing of the Tender Process, but will act reasonably in setting such requirements and terms. If the tenderer is required to engage subcontractors, qualification criteria will include a requirement that the tenderer engage subcontractors with the requisite technical and financial capabilities to undertake the Project.

### (**State to ensure appropriate methodology**): The State, in setting the qualification criteria and the other requirements and terms of the Tender Process, must ensure that there is in place an appropriate methodology for comparing tenders.

### (**Project Co authorises release of information by State under Tender Process**): Project Co authorises the release of any information by the State under the Tender Process that would otherwise be prevented under this Deed that is reasonably required as part of the Tender Process.

### (**Project Co may appoint Tender Process Monitor**): Project Co may, at its own cost, appoint a person (the **Tender Process Monitor**) to monitor the Tender Process for the purpose of monitoring and reporting to Project Co and the Financiers on the State's compliance with the Tender Process and making representations to the State. The Tender Process Monitor will not disclose any confidential information in relation to tenders submitted as part of the Tender Process to Project Co or any other person except:

#### where permitted to do so by the terms of the confidentiality agreement referred to in section 3.3(f); or

#### to advise Project Co and the Financiers as to whether it considers that the State has acted in accordance with the Tender Process and correctly determined the Highest Compliant Tender Price and to provide details of any representations that the Tender Process Monitor makes to the State regarding the Tender Process.

### (**Tender Process Monitor to enter into confidentiality agreement**): Project Co will procure the Tender Process Monitor to enter into a confidentiality agreement with the State in a form acceptable to the State, and the Tender Process Monitor will be entitled to attend all meetings relating to the Tender Process, inspect copies of the tender documentation and proposals and make written representations to the State regarding compliance with the Tender Process. Project Co will procure that the Tender Process Monitor makes any such representations in relation to the Tender Process to the State in a timely manner as the Tender Process proceeds. The State will not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by Project Co in the event that Project Co refers a dispute relating to the Highest Compliant Tender Price for resolution in accordance with clauses 48 to 50.

### (**State to determine Compliant Tenders**): As soon as practicable after tenders have been received, the State will (acting reasonably) determine the Compliant Tenders. Subject to the State receiving at least two Compliant Tenders, it will notify Project Co of the Highest Compliant Tender Price. If fewer than two Compliant Tenders are received, the State must promptly notify Project Co accordingly and it will be deemed that there is no Liquid Market and the tendering process pursuant to this section 3 will cease and the 'no tendering' procedure under section 4 will automatically apply.

### (**Discretion of State following Tender Process**): The State is not obliged to enter into any contract with any person, resulting from the Tender Process. It may enter into a contract in its sole and absolute discretion.

### (**Dispute resolution**): If Project Co refers a Dispute relating to the Highest Compliant Tender Price or the Default Termination Payment calculated under this section 3 for resolution in accordance with clauses 48 to 50, the State will still be entitled to enter into a contract replacing this Deed (whether or not a New Contract).

### (**State may elect to follow 'no tendering' procedure**): The State may elect at any time prior to the receipt of two Compliant Tenders to follow the 'no tendering' procedure under section 4 by notifying Project Co that this election has been made.

### (**Calculation of Default Termination Payment if Liquid Market exists**): If a Liquid Market exists, the Default Termination Payment is determined in accordance with section 3.2 and this section 3.3 and (where the Default Termination Payment is a positive amount) Project Co has complied with clause 46.6(c):

#### the Default Termination Payment, calculated in accordance with section 3.2 and this section 3.3 will be payable within 20 Business Days of the date of the New Contract; or

#### if the State chooses not to enter into any contract with any person resulting from the Tender Process, it must notify Project Co accordingly in which case the Default Termination Payment calculated in accordance with section 3.2 and this section 3.3 will be payable within 20 Business Days of such notification.

# No tendering

1. If the State terminates this Deed due to the occurrence of a Default Termination Event (whether any other right of termination then applies) and section 3.1(a)(ii) applies, or a Liquid Market does not or is deemed not to exist under section 3.3(g), or where section 3.3(j) applies, the Default Termination Payment will be calculated as follows:
2. **TP = A - C - D - E - F - G - H + J - M - N**
3. where:

**TP** = the Default Termination Payment;

**A** = the Fair Market Value of the Project as at the Compensation Date determined by the Independent Expert on the basis that this Deed and each of the other State Project Documents as existing immediately prior to the Expiry Date had continued until the Final Expiry Date (but for the earlier termination).

1. In determining item A, the Independent Expert must determine the net present value of the projected cash flows for the period between the Compensation Date and the Final Expiry Date calculated on a nominal pre-tax basis using the rate of indexation forecast in the most recently published State Budget papers and otherwise by:

#### assessing the market value as though the willing buyer was bidding in a public tender process for the right to enter into a New Contract;

#### assuming that:

##### the Project Activities are carried out in accordance with, and to the standards set out in, the PSDR and otherwise in accordance with this Deed;

##### the provisions with respect to payment of the State Contribution, Floating Rate Component and Service Payments continue to apply as provided for in this Deed;

##### any breach of this Deed and any deductions for Abatements occurring prior to the Compensation Date will be disregarded for the purposes of the New Contract; and

##### the Project Documents will be amended as required to reasonably allow for an incoming provider to carry out the Project Activities in accordance with, and to the standards set out in, the PSDR and otherwise in accordance with this Deed;

#### taking into account:

##### the costs (if any), and their timing, which are required to be incurred to complete the Works in accordance with this Deed and to achieve Commercial Acceptance;

##### the reinstatement or repair costs (if any) and their timing, including a reasonable contingency against Project risks, required to be incurred with respect to the Project Assets and the Site to enable the carrying out of the Project Activities until the Final Expiry Date in accordance with, and to the standards set out in, the PSDR and otherwise in accordance with this Deed; and

##### any costs, and their timing, required to be incurred to enable the buyer (who is to become the new "Project Co") to carry out the Project Activities in accordance with, and to the standards set out in, the PSDR and otherwise in accordance with this Deed and otherwise to perform Project Co's obligations under the Project Documents,

* + 1. but excluding any costs in relation to which the State will retain the benefit of a Retention Amount, a Defects Retention Amount, a Handover Escrow Account or a Handover Bond (if any); and

#### using a discount rate to calculate the net present value of the cashflows based on the following formula:

* 1. **
	2. where:
		1. **R** =the discount rate;
		2. **PIRR** = the pre-tax Project internal rate of return (real) as shown in the Financial Model;
		3. **CBb** = the real yield to maturity as at the Compensation Date on a benchmark Commonwealth bond traded in the Australian bond markets with a modified duration closest to that of the weighted average life of any outstanding amounts referred to in paragraph (b) of the definition of Project Debt as shown in the Financial Model;
		4. **CBa** = the real yield to maturity as at the date of Financial Close on a benchmark Commonwealth bond traded in the Australian bond markets with a modified duration closest to that of the weighted average life of any outstanding amounts referred to in paragraph (b) of the definition of Project Debt as shown in the Financial Model; and
		5. **i** = the assumed long term CPI (or equivalent) indexation rate using the rates of indexation forecast in the most recently published State Budget papers;

**C** = the Tender Costs (if any) and the State's reasonable forecast internal and external costs of tendering a form of contract(s) for the Project Activities to replace this Deed after termination of this Deed;

**D** = any Liability of Project Co to the State under the State Project Documents, including all amounts in respect of which the State is entitled to exercise a right of set-off under this Deed (but subject to clauses 43.11(c) and (d) (other than clause 43.11(d)(vi)(E)(3)));

**E** = any additional costs reasonably incurred by the State as a direct result of the Default Termination Event (but subject to clauses 43.11(c) and (d) (other than clause 43.11(d)(vi)(E)(3)));

**F** = to the extent the aggregate of all Post Termination Quarterly Amounts equates to a negative number, the absolute value of the aggregate of all such amounts calculated under this Deed. For the avoidance of doubt the Default Termination Payment is reduced where the aggregate of all Post Termination Quarterly Amounts equates to a negative number;

**G** = any gains which have accrued, or will accrue, to Project Co as a result of the termination of this Deed or termination of any other Project Document;

**H** = the aggregate of:

#### Insurance proceeds:

##### that would have been received before the Expiry Date but for an Insurance Failure Event and which if so received would have been, or would have been required to be, applied towards any other component of the Default Termination Payment calculated under this section 4; and

##### received or receivable by Project Co at any time during the period between the Expiry Date and the Compensation Date, except for Insurance proceeds:

###### that are required under the Project Documents to be (and are) applied to repairing or reinstating the Works or the Project Assets; or

###### representing Insurance indemnification of Project Co against liabilities to third parties;

#### any other amounts owing to Project Co; and

#### any credit balances standing in accounts held by or for the benefit of Project Co on the Expiry Date (other than those amounts which Project Co holds on trust for a subcontractor in those accounts in accordance with the Finance Documents),

* 1. in each case only to the extent it has not otherwise been taken into account in calculating the Default Termination Payment under this section 4;

**J =** any amounts owing by the State to Project Co under the State Project Documents as at the Expiry Date (including amounts of any State Contribution, Floating Rate Component or Service Payments which have accrued but not been paid as at the Expiry Date);

**M =** any third party amounts paid to Project Co at any time during the period between the Expiry Date and the Compensation Date; and

**N** = the costs incurred by the State of engaging the Independent Expert to administer this Schedule.

1. In calculating items A to N, there will be no double counting of amounts. Without limitation, the value of any unpaid State Contribution may be taken into account in item A paragraph (ii)(B) as an amount payable under the New Contract, or in item J as an amount payable to Project Co, but not both.

# Termination for Convenience

1. If this Deed is terminated for convenience under clause 46.2, the Termination for Convenience Payment will be calculated as follows.
2. The Termination for Convenience Payment or TP means the greater of:

**TP = A + B - D +/- G - H + J + K + L - M**

and

**TP = A +/- G - H + J - M**

1. where:
2. **TP** =the Termination for Convenience Payment;

**A** = the Project Debt as at the Expiry Date (but disregarding the impact of any modelled payment of the State Contribution on the amount forecast in the Financial Model to be owing to the Financiers as at that date, where such State Contribution is due and payable under this Deed but has not been paid to Project Co);

**B** = where the Expiry Date occurs:

#### prior to the Date for Commercial Acceptance, the amount set out in the table below which corresponds to the time period in which the date of termination under clause 46.2 occurs:

* + 1. [***State Note: Respondents are to bid a fixed value required to compensate equity in respect of each 6 month period after Financial Close to the Date for Commercial Acceptance. Respondents to insert additional periods as required.***]

|  |  |
| --- | --- |
| **Time period in which termination under clause 46.2 occurs** | **Amount** |
| The period commencing on Financial Close and expiring on the date which is 6 months after Financial Close (**Period 1**) | The amount as shown in cell [#] of the [#] worksheet of the Model Output Schedule in the Financial Close Financial Model. |
| The period commencing on the date immediately after the expiration of Period 1 (**Period 2 Commencement Date**) and expiring on the date which is 6 months after the Period 2 Commencement Date (**Period 2**)  | The amount as shown in cell [#] of the [#] worksheet of the Model Output Schedule in the Financial Close Financial Model. |
| The period commencing on the date immediately after the expiration of Period 2 (**Period 3 Commencement Date**) and expiring on the date which is 6 months after the Period 3 Commencement Date (**Period 3**)  | The amount as shown in cell [#] of the [#] worksheet of the Model Output Schedule in the Financial Close Financial Model. |
| [insert period] | [insert] |

#### on or after the Date for Commercial Acceptance, the value of the equity as assessed by the Independent Expert as set out below.

* 1. The value assessed by the Independent Expert under paragraph (ii) must be determined through a discounted cash flow valuation for the period from the Expiry Date to the Final Expiry Date. The valuation must apply paragraphs (iii) – (v) below, and apply generally accepted principles and practices for cash flow valuations of assets. The Independent Expert must take into account:

#### the projected revenue to an incoming Project Co reasonably expected assuming:

##### the provisions of the Payment Schedule and those relating to payment of the Floating Rate Component and the State Contribution continue to apply; and

##### the arrangements for those commercial opportunities not retained by Equity Investors following termination, including any revenue-sharing with the State, continue to apply;

#### the projected capital and operating costs reasonably expected to be incurred by an incoming Project Co in connection with delivering the Project Activities, and assuming the Services are delivered in accordance with, and to the standards set out in, the PSDR and otherwise in accordance with this Deed; and

#### the financing costs of Project Co under the Finance Documents as calculated in the Financial Model but adjusted where those costs are reasonably expected to change because the Finance Documents require refinancing after the Expiry Date,

* 1. and in each case on the basis that the Project Documents, as amended in accordance with this Deed, continue in full force and effect from the Expiry Date to the Final Expiry Date. To prepare the projections referred to in paragraphs (iii) and (iv) above, the Independent Expert is not constrained by values in the Financial Model, and should apply reasonable contingency to cash flows to account for Project risks. The Independent Expert must discount cash flows using a rate per annum equivalent to market rates of return to equity for projects with a similar risk profile to this Project;

**D =** any Liability of Project Co to the State under the State Project Documents, including all amounts in respect of which the State is entitled to exercise a right of set-off under this Deed (but subject to clauses 43.11(c) and (d) (other than clause 43.11(d)(vi)(E)(3)));

**G =** the amount of costs incurred or gains realised by Project Co (acting reasonably) as a direct result of terminating the Finance Documents, including as a result of terminating or reversing any derivative position or arising from prepayment of debt or interest, in each case arising from the State's election to terminate for convenience under clause 46.2. If the net amount is a gain, it should be a deduction from, and if it is a cost, it should be an addition to, this Termination for Convenience Payment;

**H =** the aggregate of:

#### any Insurance proceeds:

##### that would have been received before the Expiry Date but for an Insurance Failure Event and which if so received would have been, or would have been required to be, applied towards any other component of the Termination for Convenience Payment calculated under this section 5; and

##### received or receivable by Project Co at any time during the period between the Expiry Date and the Compensation Date, except for Insurance proceeds:

###### that are required under the Project Documents to be (and are) applied to repairing or reinstating the Works or the Project Assets; or

###### representing Insurance indemnification of Project Co against liabilities to third parties;

#### any other amounts owing to Project Co; and

#### any credit balances standing in accounts held by or for the benefit of Project Co on the Expiry Date (other than those amounts which Project Co holds on trust for a subcontractor in those accounts in accordance with the Finance Documents),

* 1. in each case only to the extent it has not otherwise been taken into account in calculating the Termination for Convenience Payment;

**J** = any amounts owing by the State to Project Co under the State Project Documents as at the Expiry Date (including the amount of any Service Payments or Floating Rate Component which has accrued but not been paid as at the Expiry Date) but excluding any State Contribution which is owing as at the Expiry Date;

**K =** redundancy payments for employees of Project Co that have been or will be reasonably and properly incurred by Project Co as a direct result of the termination of this Deed and which would not have been otherwise incurred if this Deed was not terminated under clause 46.2;

**L =** the State's Liability to Project Co for any Subcontractor Termination Amounts, but only to the extent specified in clause 9.3(g)(iii) to (vi); and

**M =** any third party amounts paid to Project Co at any time during the period between the Expiry Date and the Compensation Date.

1. In calculating items A to M, there will be no double counting of amounts.

# Termination for Force Majeure Termination Event

## Termination - No Default Termination Event subsisting

1. Subject to section 6.2, if the State or Project Co terminates this Deed due to a Force Majeure Termination Event and a Default Termination Event is not then subsisting, the Force Majeure Termination Payment will be the greater of:

### an amount calculated as though a Default Termination Payment was due, calculated in accordance with section 4; and

### an amount calculated in accordance with section 6.3.

## Termination - Default Termination Event subsisting

1. If the State or Project Co terminates this Deed due to a Force Majeure Termination Event and a Default Termination Event is then subsisting, this section 6 will not apply and the Termination Payment will be an amount calculated in accordance with the provisions of section 3 or (if required by section 3) the provisions of section 4.

## Force Majeure Termination Payment

1. Subject to sections 6.1 and 6.2, the Force Majeure Termination Payment where this Deed is terminated as a consequence of the occurrence of a Force Majeure Termination Event will be calculated as follows:

**TP = A - D +/- G - H + J - M - O**

where:

**TP** = the Force Majeure Termination Payment;

**A** = the Project Debt as at the Expiry Date (but disregarding the impact of any modelled payment of the State Contribution on the amount forecast in the Financial Model to be owing to the Financiers as at that date, where such State Contribution is due and payable under this Deed but has not been paid to Project Co);

**D** = any Liability of Project Co to the State under the State Project Documents, including all amounts in respect of which the State is entitled to exercise a right of set-off under this Deed (but subject to clauses 43.11(c) and (d) (other than clause 43.11(d)(vi)(E)(3)));

**G** = the amount of costs incurred or gains realised by Project Co (acting reasonably) as a direct result of terminating the Finance Documents, including as a result of terminating or reversing any derivative position or arising from prepayment of debt or interest, in each case arising from the State's or Project Co's election to terminate this Deed as a consequence of the occurrence of a Force Majeure Termination Event. If the net amount is a gain, it should be a deduction from, and if it is a cost, it should be an addition to, this Termination for Force Majeure Payment;

**H =** the aggregate of:

#### any Insurance proceeds:

##### that would have been received before the Expiry Date but for an Insurance Failure Event and which if so received would have been, or would have been required to be, applied towards any other component of the Termination for Force Majeure Payment calculated under this section 6.3; and

##### received or receivable by Project Co at any time during the period between the Expiry Date and the Compensation Date, except for Insurance proceeds:

###### that are required under the Project Documents to be (and are) applied to repairing or reinstating the Works or the Project Assets; or

###### representing Insurance indemnification of Project Co against liabilities to third parties;

#### any other amounts owing to Project Co; and

#### any credit balances standing in accounts held by or for the benefit of Project Co on the Expiry Date (other than those amounts which Project Co holds on trust for a subcontractor in those accounts in accordance with the Finance Documents),

* 1. in each case only to the extent that it has not otherwise been taken into account in calculating the Termination for Force Majeure Payment under this section 6.3;

**J =** any amounts owing by the State to Project Co under the State Project Documents as at the Expiry Date (including the amount of any Service Payments or Floating Rate Component which has accrued but not been paid as at the Expiry Date) but excluding any State Contribution which is owing as at the Expiry Date;

**M =** any third party amounts paid to Project Co at any time during the period between the Expiry Date and the Compensation Date; and

**O =** to the extent such amounts are outstanding at the Expiry Date, any amounts included in item A that are intended (as described in the Financial Model) to be refinanced in the form of equity or subordinated debt treated as equity, such amount including any accrued, deferred or rolled up interest.

1. In calculating items A to O, there will be no double counting of amounts.

# Interest

1. In respect of Termination Payments calculated under this Schedule only, interest accrues:

### in respect of a Termination Payment calculated under section 3 or section 4, from the 21st Business Day after the Compensation Date to (but excluding) the date on which the Termination Payment is paid in full. Interest accrues on that Termination Payment at the default rate provided in the relevant Finance Document. Interest is payable on the date on which the Termination Payment is paid; and

### in respect of any Termination Payment calculated under section 5 or section 6, from and including the Expiry Date to (but excluding) the date on which the Termination Payment is paid in full. Interest on the Actual Debt portion of that Termination Payment accrues at the rate provided in the relevant Finance Document from and including the day after the Expiry Date to and including the 20th Business Day after the Expiry Date and thereafter on the whole of that Termination Payment at the default rate provided in the relevant Finance Document. Interest is payable on the date on which the Termination Payment is paid.

# Insurance

1. If any proceeds of Insurance are received by Project Co after this Deed is terminated (other than those Insurance proceeds representing Insurance indemnification of Project Co against liabilities to third parties) and those proceeds:

### were not taken into account in calculating the Termination Payment that has already been made on the basis that the amounts were not "owing to Project Co", "received" or "received or receivable" by Project Co at the relevant time;

### would have been so taken into account had they been owing, received or receivable at the time of calculating the Termination Payment; and

### apply to the period up to and including the date of payment of the Termination Payment,

1. then those proceeds are held on trust by Project Co for the State, and Project Co must pay those proceeds, or cause those proceeds to be paid, to the State for the State's retention promptly on receipt. If the proceeds are not yet received then, to the maximum extent legally possible, the State will be subrogated to the rights of Project Co in respect of those proceeds, and entitled to recover and retain the proceeds accordingly. The rights and obligations in this section 8 survive the expiry or early termination of this Deed.

# Mitigation

1. Each party must use all reasonable endeavours to mitigate and minimise losses or costs to be included in the calculation of the relevant Termination Payment. Project Co must use all reasonable endeavours to maximise receipts and gains which are to be calculated within any Termination Payment.